FEB 21 1953

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 621

EDWARD D. HENDRICKSON,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit

and

BRIEF IN SUPPORT THEREOF.

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IN THE

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No. .....

EDWARD D. HENDRICKSON,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward D. Hendrickson, respectfully prays that a writ of certiorari issue to review a decision of the Circuit Court of Appeals for the Seventh Circuit, affirming the conviction of your petitioner in the United States District Court for the Southern District of Illinois.

Counsel for petitioner respectfully presents to the Court that no one of them are permitted to practice in the United

States Supreme Court, and, therefore Virgil M. Jacoby respectfully prays that he may be permitted to appear specially in the presentation of this Petition for a Writ of Certiorari.

I.

SHORT STATEMENT OF CASE.

Petitioner, Edward D. Hendrickson, was indicted in the District Court aforesaid in the January, 1952 Term thereof for subornation of perjury. The Indictment consisted of four counts and is based upon Title 18, Section 1622, U. S. Code.

A.

Count I of the Indictment.

Count I of the Indictment (R. 1) charged that on September 25, 1950, in the trial of a certain suit brought under the Dram Shop Act of the State of Illinois (Chap. 43, Sec. 135), by the widow and next of kin of James Patrick Maher to recover from petitioner, his bartender, and one Woodrow Wilson Morris, damages for loss of services by reason of the fact that the husband and father of plaintiffs met his death in a drunken brawl with the said Woodrow Wilson Morris on December 23, 1948, petitioner procured T. K. Brawley in said suit to commit perjury by testifying falsely that he was present in the tavern of petitioner at the time Woodrow Wilson Morris, Geraldine Morris Lichty, his then wife, and James Patrick Maher entered and remained in said tavern, and that no drinks were served to them or any of them, which said testimony was false and known to be false by both petitioner and Brawley and each knowing that the other knew of the falsity of such testimony.

B.

Count II of the Indictment.

Count II of the Indictment (R. 2) charged that on April 16, 1951, in the court aforesaid Maurice I. Fuller, petitioner's bartender, was tried for perjury allegedly committed in the Dram Shop suit referred to in Count I of the Indictment and that petitioner procured T. K. Brawley to commit perjury by testifying falsely that he, T. K. Brawley, was present in the tavern of petitioner at the time Woodrow Wilson Morris, Geraldine Morris Lichty, his then wife, and James Patrick Maher entered and remained in said tavern, and that no drinks were served to them or any of them, which said testimony was false and known to be false by both petitioner and Brawley and each knowing that the other knew of the falsity of such testimony.

C.

Count III of the Indictment.

Count III of the Indictment (R. 2) charged that on September 25, 1950, in the trial of a certain suit brought under the Dram Shop Act of the State of Illinois (Chap. 43, Sec. 135), by the widow and next of kin of James Patrick Maher to recover from petitioner, his bartender, and one Woodrow Wilson Morris, damages for loss of services by reason of the fact that the husband and father of plaintiffs met his death in a drunken brawl with the said Woodrow Wilson Morris on December 23, 1948, petitioner procured Louis Garner in said suit to commit perjury by testifying falsely that he was present in the tavern of petitioner at the time Woodrow Wilson Morris, Geraldine Morris Lichty, his then wife, and James Patrick Maher entered and remained in said tavern, and that no drinks were served to them or any of them, which said

testimony was false and known to be false by both petitioner and Garner and each knowing that the other knew of the falsity of such testimony.

D.

Count IV of the Indictment.

Count IV of the Indictment (R. 3) charged that on April 16, 1951, in the court aforesaid Maurice I. Fuller, petitioner's bartender, was tried for perjury allegedly committed in the Dram Shop suit referred to in Count I of the Indictment and that petitioner procured Louis Garner to commit perjury by testifying falsely that he, Louis Garner, was present in the tavern of petitioner at the time Woodrow Wilson Morris, Geraldine Morris Lichty, his then wife, and James Patrick Maher entered and remained in said tavern, and that no drinks were served to them or any of them, which said testimony was false and known to be false by both petitioner and Garner and each knowing that the other knew of the falsity of such testimony.

E.

The Pleadings.

Within apt time for so doing petitioner filed and there was argued on his behalf a Motion to Quash the Indictment (R. 7) which was based principally upon the premise that the alleged false testimony alleged to be perjury was immaterial to the issues in the cause in which it was offered. The Motion to Quash was denied.

At the close of plaintiff's case against petitioner he filed and there was argued on his behalf a Motion for Acquittal (R. 6). The Motion for Acquittal was based upon the same premise as that contained in the Motion to Quash the Indictment. The Motion for Acquittal was overruled.

The Motion for Acquittal was renewed at the close of all the evidence (R. 6). Again the Motion for Acquittal was denied.

A Motion for New Trial and a Motion in Arrest of Judgment were filed and argued for petitioner (R. 6). They too were based primarily on the theory that there was no perjury since the alleged false testimony was immaterial to the issues in the cause in which such testimony was offered. Each motion was overruled.

F.

Verdict.

The jury found petitioner guilty on all counts of the Indictment (R. 13). Motions for a new trial and in arrest of judgment were denied.

G.

Sentence.

The Court thereupon entered judgment as to the defendant, as follows:

> It is adjudged that the defendant is guilty as charged and convicted.
>
> It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of thirty (30) months (R. 13).

H.

Appeal to the Circuit Court of Appeals.

Petitioner effected his appeal to the Circuit Court of Appeals for the Seventh Circuit (R. 14) which, by its written opinion dated November 24, 1952, affirmed the judgment of the trial court in all respects (R. 32).

I.

Rehearing.

The Petition for Rehearing was within apt time filed but denied by the Circuit Court of Appeals by its Order of December 23, 1952 (R. 38).

J.

Extension of Time Within Which to File Petition for Writ.

Petitioner applied to this Honorable Court for an extension of time within which to file a Petition for a Writ of Certiorari and by Order dated January 19, 1953, petitioner's time was extended to and including February 21, 1953.

K.

The Evidence.

The evidence showed:

1. That Maurice I. Fuller, called as an adverse witness under Rule 43, Federal Rules of Civil Procedure, T. K. Brawley and Louis Garner, called as witnesses for the defendants, testified falsely in the original Dram Shop suit (R. 4).

2. That Maurice I. Fuller, T. K. Brawley and Louis Garner testified falsely in the perjury trial of Maurice I. Fuller (R. 5, 6).

3. That in the trial of the case mentioned in Paragraph 2 next above, petitioner knew that the testimony was false and known to be false by both petitioner and the witness, and each knowing that the other knew of the falsity of such testimony and that such testimony was procured by petitioner (R. 6).

4. That in the trial of the case mentioned in Paragraph 1 above, petitioner knew that the testimony of T. K. Braw-

ley and Louis Garner was false and was known to be false by both petitioner and the witnesses, and each knew that the other knew of the falsity of such testimony and that such testimony was procured by said petitioner (R. 6).

5. That in the original Dram Shop suit James Patrick Maher, husband and father of plaintiffs who brought suit against his assailant, Woodrow Wilson Morris, and Woodrow Wilson Morris, the assailant, were intoxicated or drunk at the time they entered the tavern of petitioner, Hendrickson (R. 5, 21, 23).

6. All witnesses who testified for the plaintiffs in the original Dram Shop suit who were factual or occurrence witnesses testified that both James Patrick Maher and Woodrow Wilson Morris were intoxicated or drunk at the time they entered the tavern of petitioner, Hendrickson (R. 11).

7. The trial court found at the conclusion of the evidence that "There is no doubt from the evidence but what Maher and Morris became intoxicated sometime prior to going to the tavern—Hendrickson's tavern." "There is no doubt but what Morris and Maher were just about as drunk as a man gets before they went into Eddy's tavern" (R. 21).

8. The Court of Appeals for the Seventh Circuit found "There is no dispute that Maher was killed in a brawl with Morris while both were intoxicated" (R. 24). "It is clear that the two men were intoxicated at the time they entered defendant's tavern."

L.

Exhibits.

Exhibit A (R. 21)—This exhibit shows that the District Court had no doubt but what Maher and Morris were intoxicated at the time they entered the tavern of petitioner.

Exhibit B (R. 23 at 24)—This Exhibit is offered for the purpose of showing that the Court of Appeals felt that while there was no dispute but what Maher was killed in a brawl with Morris while both were intoxicated, yet, it was likewise clear that the two men were intoxicated at the time they entered petitioner's tavern. It was likewise held by the Court of Appeals that "the material question in issue in the trial court was whether their drunkenness was caused in whole or in part by liquor procured from the defendants."

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals for the Seventh Circuit by its written opinion dated November 24, 1952 (R. 32, 33, 34, 35, 36) affirmed the judgment of the trial court in all respects.

In so doing the Court of Appeals **avoided,** rather than **decided,** a basic principle submitted to them for decision. They said "neither do we need set sail on an uncharted sea in an attempt to determine if a man already drunk can be found intoxicated by the consumption of alcoholic liquor" (R. 35). The question of whether or not a tavern keeper, by the sale of liquor to a man already drunk, could become liable for the tort of the drunken man was carefully avoided by the Circuit Court of Appeals.

Rehearing.

The Petition for Rehearing was aptly filed but denied by the Circuit Court of Appeals by its Order dated December 22, 1952.

II.

STATEMENT OF MATTERS INVOLVED AND THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The discretionary power of this Court to grant writ of certiorari is invoked on the following grounds:

(First) The decision of the Seventh Circuit Court of Appeals in affirming the judgment of the trial court constitutes a decision on an important question of local law in a way probably in conflict with applicable local decisions.

(1) The Illinois Liquor Control Act (commonly called the Illinois Dram Shop Act, Chap. 43, Sec. 135, Illinois Revised Statutes, 1949) creates a cause of action for loss of services by a wife and child against the person or persons who by selling or giving of alcoholic liquors has caused, in whole or in part, the intoxication of the tortfeasor (R. 9).

This statute is highly penal in nature, provides a right of action unknown to the common law, and should receive a strict construction.

Howlett v. Doglio et al., 402 Ill. 311, 83 N. E. (2d) 708, at 712.

(2) A statute must be constructed to mean what it says. The court must take words found in statute according to their ordinary and usual meaning.

Howlett v. McGarvey;
Howlett v. Doglio, 334 Ill. App. 512, 79 N. E. (2d) 864, at 867.

(3) Ever since the passage of the Illinois Liquor Control Act in 1934 the courts of Illinois have refused to enlarge upon the classification of actionable injuries under said

Act and in three separate instances have limited its application:

(A) It refused to permit recovery of damages for injury to property beyond injuries to tangible, real or personal property.

Howlett v. Dogolio, 402 Ill. 311, 83 N. E. (2d) 708, at 714.

(B) It refused to allow recovery in cases wherein intoxication occurred in Illinois and the action resulting therefrom in another state.

Eldridge v. Beachcomber, Inc., 342 Ill. App. 151, 95 N. E. (2d) 512, at 513.

(C) It refused to impose liability on a friendly host who gave a glass of intoxicating liquor to a guest which liquor caused in whole or in part the intoxication of a tortfeasor.

Cruse v. Aden, 127 Ill. 231, 20 N. E. 73, at 77.

(4) Counsel for petitioner states that although he has read every adjudicated case in Illinois on the Illinois Liquor Control Act, commonly called the Dram Shop Act, neither the Supreme Court of the State of Illinois nor any Appellate Court of Illinois has passed upon the question raised herein.

(Second) The decision of the Seventh Circuit Court of Appeals in affirming the judgment of the trial court so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision by reversal.

(1) The burden of proof was upon plaintiffs in the original Dram Shop suit to prove every material allegation of their complaint by the time they closed their case. This they did not do. They did not establish that any sale or gift of liquor by petitioner or his bartender caused the

tortfeasor to become intoxicated. In fact, the witnesses for plaintiffs precluded such proof by proving conclusively that both the tortfeasor and the husband and father of plaintiffs were drunk or intoxicated at the time they entered petitioner's tavern.

(2) If plaintiffs in the original Dram Shop suit failed to discharge the burden of proof which the law placed upon them, even though no motion for a directed verdict or for a finding in favor of the defendants was made at the close of plaintiff's case, the trial court should have entered an order in favor of the defendant on its own motion.

(We deem the above statements of law in Paragraphs 1 and 2 next above to be so axiomatic as to need no citation of authority to support them, hence none is given.)

(3) The federal law with reference to perjury and subornation thereof seems to be that false testimony is material within the meaning of the term "material" when it has the capacity to affect or influence the trial judge in his judicial action, or in the exercise of his judicial discretion.

Boehm v. United States, 123 Fed. 2d 791;
United States v. Henderson, 185 Fed. 2d 189.

In the original Dram Shop suit a motion for a directed verdict at the close of plaintiffs' case should have been allowed. Petitioner's bartender, Maurice I. Fuller, testified, not voluntarily but as a result of having been called by plaintiffs' counsel, under Rule 43 of Federal Rules of Criminal Procedure, plaintiffs were not bound by his testimony. Consequently, at the close of plaintiffs' case, giving them the benefit of every bit of proof or reasonable intendment thereof they had only proven that petitioner or his bartender had sold or given intoxicating liquors to two men who had already reached the stage of drunkenness or intoxication.

No testimony of Fuller, Brawley or Garner could have influenced or affected the trial judge in his judicial action or discretion. Judicial action or discretion demanded only that the court direct a verdict for the defendants.

(4) In a rather recent expression of this court in an opinion dated April 23, 1951, wherein perjury was involved, it is said, "Where a federal court has power, as here, to proceed to a determination on the merits, that is jurisdiction of the proceedings."

False testimony, under oath, before the court was perjury even though:

(a) The trial court or an appellate court may conclude that the statute is wholly unconstitutional.

(b) That the facts stated in the Indictment does not constitute a crime.

(c) That the facts stated in the Indictment are not proven.

U. S. v. Williams, 341 U. S. 58, 71 S. Ct. 595, at 601.

In the instant case it is to be remembered that parallel facts do not exist. In the Dram Shop suit involved herein, plaintiff not only did not prove the facts stated in their complaint, but disproved them. Thus, they removed forever and effectually barred themselves from molding together into a cause of action the facts arising out of the death of Maher at the hands of Morris.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete Transcript of the Record and of the proceedings of said Circuit Court had in the case entitled and numbered on its docket "United States of America vs. Edward D. Hendrickson," No. 10688, to the end that the decision and judgment

of said Circuit Court of Appeals may be reviewed and determined by this Court as provided by the laws of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as this Court may deem just and proper.

EDWARD D. HENDRICKSON, Petitioner,

JACOBY, PATTON & MANNS,

By: VIRGIL M. JACOBY,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears in full in the record at pages 32-36. The opinion of the District Court appears in full in the record at pages 21-23.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under the authority of U. S. C. A., Title 28, Section 1254, June 25, 1948, c. 646, 62 Stat. 928.

Dates of Judgment.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was rendered November 24, 1952.

The order denying rehearing was dated December 23, 1952.

Extension of Time to File Petition for Writ.

This Court, by its order of January 19, 1953, extended the time for filing petition for writ of certiorari to and including February 21, 1953.

III.

STATEMENT OF CASE.

A full statement of the case having been made in the petition for writ of certiorari, it is omitted here for the sake of brevity.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In failing and refusing to hold that the testimony of T. K. Brawley and Louis Garner was immaterial in the cause in which it was offered and hence was not perjury.

2. In refusing to determine the materiality of the testimony of T. K. Brawley and Louis Garner even though such determination amounted to a construction of the Illinois Dram Shop Act and "sailing an uncharted sea."

3. In affirming the judgment of the District Court.

ARGUMENT.

The record in this cause in the appeal from the District Court to the Circuit Court of Appeals consisted of an Agreed Statement and Supplement in the form of a stipulation of facts signed by counsel for plaintiff and defendant (R. 1-26).

It is revealed by this Agreed Statement that the criminal prosecution is based:

(A) So far as Counts I and III of the Indictment are concerned on testimony given by T. K. Brawley and Louis Garner, in the trial of the Dram Shop suit brought against petitioner, his bartender, and one Woodrow Wilson Morris, in which suit plaintiffs sought to recover from defendants for loss of services due to the death of James Patrick Maher in a brawl with Woodrow Wilson Morris at a time when said Woodrow Wilson Morris and James Patrick Maher were drunk or intoxicated which condition was due in whole or in part to liquor sold or given them by petitioner or his bartender (R. 8).

(B) So far as Counts II and IV of the Indictment are concerned on testimony given by T. K. Brawley

and Louis Garner in the trial of Maurice I. Fuller for perjury allegedly committed in the original Dram Shop suit (R. 8, 9).

We assume that there could be no subornation of perjury by petitioner, Hendrickson, if the admittedly false testimony of Fuller, Brawley and Garner did not constitute perjury (R. 35) as stated in the opinion of the Court of Appeals (R. 32-37).

It is to be borne in mind that petitioner was not a party to the criminal prosecution of Fuller for perjury mentioned in Counts II and IV of the Indictment.

Likewise, nowhere in the record does it appear that petitioner himself ever uttered one word of false testimony. It is significant also to note that in the original Dram Shop suit Maurice I. Fuller did not voluntarily testify nor was he called as a witness for petitioner, but only appeared when called under Rule 43 of the Federal Rules of Criminal Procedure. Plaintiffs might use this testimony if they chose, but certainly were not bound by it. It is inconceivable to us that even if the testimony of Maurice I. Fuller was false when called under Rule 43 that any reasonably prudent man could say that petitioner had procured such false testimony.

The law is well settled that where a court has jurisdiction of the subject matter and of the parties, and the testimony given is material to the inquiry then before the court, false swearing is perjury. This has been held to be true:

1. Although the proceedings may be so irregular or erroneous as to require reversal on appeal.

2. Although the statute out of which the perjury proceedings arose is determined by the trial court or appellate court to be wholly unconstitutional.

3. Although it is determined that the facts stated in the Indictment do not constitute a crime.

4. Although the facts stated in the Indictment are not true.

Equally well settled is the law that where false testimony has the capacity of affecting or influencing the trial judge in his judicial action, or in the exercise of his judicial discretion, then the false testimony is material within the meaning of the term "material."

In the instant case, however, the testimony offered by plaintiffs in the original Dram Shop suit in their case in chief irretrievably placed this cause beyond the realm in which any witness of the defendant or any defendant might have become guilty of perjury or subornation of perjury. Plaintiffs' own witnesses for whom they vouched, without the shadow of a doubt, placed both Morris and Maher in a condition of extreme drunkenness or intoxication. The Dram Shop Act does not apply in such a case. No provision is made for it in the Illinois Liquor Control Act. Counsel for the defendant might well have filed a motion for a directed verdict. In the absence of this, the trial judge should, of his own motion, have directed a verdict. The failure of the trial judge to apply the law to the facts is evident. How then can it be said that later Fuller, Brawley and Garner, or any combination or group of them, could influence the trial judge in his "judicial action" or in the exercise of his "judicial discretion"? From the time plaintiffs rested their case in the original Dram Shop suit that cause was branded with indiscretion. The testimony of Fuller, Brawley and Garner was not material and such testimony does not come within the purview of any exception set forth by our courts. Their testimony did not prove that the facts stated in the complaint did not state a cause of action. Their testimony did not prove that the facts stated in the complaint were

not true. This had already been done by plaintiffs and their witnesses.

Wherefore, it is respectfully submitted that the petitioner has been aggrieved by the decision of the Circuit Court of Appeals for the Seventh Circuit, and this case should be certified to this Court for its review and determination.

Respectfully submitted,

JACOBY, PATTON & MANNS,

By VIRGIL M. JACOBY,

Counsel for Petitioner.

APPENDIX.

Illinois Revised Statutes 1947, Chap. 43, Sec. 135 (Dram Shop Act).

"Actions for damages caused by intoxication—Lessor's liability—Forfeiture of lease—Maximum recovery—Limitations. 14. Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suit and to control the same and the amount recovered as a feme sole; and all damages recovered by a minor under this Act shall be paid either to such minor, or to his or her parent, guardian or next friend as the court shall direct; and the unlawful sale, or giving away, of alcoholic liquor, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this Act may be by any appropriate action in any of the courts of this State having competent jurisdiction."

Sec. 1621, Title 18, U. S. C. A. "Perjury. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

Sec. 1622, Title 18, U. S. C. A. "Subornation of Perjury. Whoever procures another to commit any perjury is guilty of subornation of perjury and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

Rule 43, Federal Rules of Civil Procedure. "* * * (b) * * * A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief. * * *"

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